LIBRARY
REME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 31 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 1024

CIMARRON COAL CORPORATION, - Petitioner,

versus

DISTRICT No. 23, UNITED MINE WORKERS OF AMERICA;
LOCAL UNION No. 1076, LOCAL UNION No. 1263, LOCAL UNION No. 1467, LOCAL UNION No. 9316, LOCAL UNION No. 9205, LOCAL UNION No. 9653, All Local Unions of DISTRICT No. 23, UNITED MINE WORKERS OF AMERICA;
ALVIE LEROY PATTERSON;
WILLIAM CORNETTE;
ARTHUR COPE;
T. H. HUMPHREY, JR.;
KENNETH OSBURN; and
CECIL DUVALL, - - - - - Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

JAMES G. WHEELER,
901 Citizens Bank & Trust Building,
Paducah, Kentucky 42001,

W. STUART McCLOY,
1701 First National Bank Building,
Memphis, Tennessee 38103,
Attorneys for Petitioner.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

SUBJECT INDEX.

	PAGE
Petition for a Writ of Certiorari	1–48
Preliminary Injunction and Order of the Trial Court and Opinion and Orders of the Court Below	2– 3
Grounds for Invoking the Jurisdiction and Review of This Honorable Court	3– 4
Questions Presented for Review	4– 7
Constitutional Provision and Statutes Involved	7
Facts Material to the Consideration of the Questions Presented	7–29
Argument	29–48
First Question	29–31
Second Question	32–39
Third Question	40–46
Fourth Question	47–48
Conclusion	49

Record Certified by Court of Appeals for the Sixth Circuit at Request of Petitioner:

Complaint and Amended Complaint.....
Preliminary Injunction of the District Court below.
Order of the District Court below.....
Transcrip tof the Proceedings in the District Court.
Opinion of the Court of Appeals below.....
Petition for Rehearing and Motion for Supplementary Petition for Rehearing and for Review in banc.....
Order of the Court of Appeals below Denying Rehearing.....
Order of the Court of Appeals below allowing 30 days to file Petition.....

TABLE OF AUTHORITIES CITED.

PAGE

Allen Bradley Local No. 1111, et al, v. Wisconsin Employment Relations Board and Allen Bradley Company (1942), 314 U. S. 740.....30, 40, 42

Angel v. Bullington, N. C. (1947), 330 U. S. 183..... 42

Blue Boar Cafeteria Company, Inc. v. Hotel and Restaurant Employees and Bartenders International Union Local No. 181 (1952), 314 Ky. 288, 254 S. W. 2d 335, cert. den. (1953), 346 U. S. 834.....30, 40

Boyd v. Deena Artware, Inc. (1951), 217 Ky. 919, 239 S. W. 2d 86.....30, 38

Brotherhood of Railroad Trainmen v. Jacksonville Terminal Company (March 25, 1969), 89 S. Ct. 1109.....3–4, 44

Clark v. Smith, 38 U. S. 195..... 42

Construction Workers v. New Burnside Veneer Co., Inc. (1954) (Ky.), 274 S. W. 2d 787 (Ct. App. 6/8/54) (26 LC 68,495)..... 41

Converse v. Highway Const. Co. of Ohio (CA 6, 1939), 107 F. 2d 127..... 29

Cupples Company v. American Federation of Labor (1937) (USDC Mo.), 20 F. Supp. 894.....32, 39

Donnelly Garment Co. v. International Ladies Garment Workers Union (DC Mo. 1938), 21 F. Supp. 807, vacted on other grounds 304 U. S. 243, cert. den. 305 U. S. 662.....29, 38

Ford v. Boeger (CCA Mo. 1966), 362 F. 2d 999, cert. den. 386 U. S. 914, Rehearings den. 368 U. S. 987.. 45

Garner v. Teamsters Local No. 776 (1953), 346 U. S. 485.....30, 40, 42

General Electric Company v. Cojack (1946) (USDC N.D. Ind.), 68 F. Supp. 686.....32, 38–39

Edward Lauf v. E. G. Shinner & Co., Inc. (1938), 303 U. S. 323.....29–30, 38, 45

Local 332, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of Amer-

PAGE

ica, et al. v. Grand Trunk Western Railroad Company (CA 6, 1956), 239 F. 2d 851 ..... 45, 46

National Electric Service Corp. v. District 50, United Mine Workers of America (Ky.), 270 S. W. 2d 808. 40

United Automobile Aircraft, et al. v. Wisconsin Employment Relations Board (1956), 351 U. S. 266, 76 S. Ct. 794 ..... 3, 43

United Electric Coal Companies v. Rice (DC Ill. 1938), 80 F. 2d 1 ..... 29, 38

United Mine Workers of America v. Gibbs (1966), 383 U. S. 715, 86 S. Ct. 1130 ..... 32, 38, 42

Youngdahl v. Rainfair, Inc. (1957), 355 U. S. 131 .. 32, 38, 42

CONSTITUTION OF THE UNITED STATES

* * * * * * * *

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * * * * * *

DISTRICT COURTS; JURISDICTION
28 USC 1332

§ 1332. Diversity of citizenship; amount in controversy; costs.

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: *Provided further,* That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico, June 25, 1948, c. 646, 62 Stat. 930; July 26, 1956, c. 740, 70 Stat. 658; July 25, 1958, Pub.L. 85-554, § 2, 72 Stat. 415; Aug. 14, 1964, Pub.L. 88-439, § 1, 78 Stat. 445.

* * * * * * *

NORRIS-LAGUARDIA ACT

JURISDICTION OF COURTS
29 USC 101

§ 101. Issuance of restraining orders and injunctions; limitation; public policy.

No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or

temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter. Mar. 23, 1932, c. 90, § 1, 47 Stat. 70.

§ 102. Public policy in labor matters declared.

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted. Mar. 23, 1932, c. 90, § 2, 47 Stat. 70.

* * * * * * *

§ 104. Enumeration of specific acts not subject to restraining orders or injunctions.

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

* * * * * * *

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

* * * * * * *

§ 107. Issuance of injunctions in labor disputes; hearing; findings of court; notice to affected persons; temporary restraining order; undertakings.

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or

committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's

fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking mentioned in this section shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity. Mar. 23, 1932, c. 90, § 7, 47 Stat. 71.

* * * * * * *

§ 113. Definitions of terms and words used in chapter.

When used in this chapter, and for the purposes of this chapter—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of

"persons participating or interested" therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia. Mar. 23, 1932, c. 90, § 13, 47 Stat. 73.

* * * * * * *

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. _____

CIMARRON COAL CORPORATION, - - *Petitioner,*

v.

DISTRICT NO. 23, UNITED MINE WORKERS OF AMERICA;

LOCAL UNION NO. 1076, LOCAL UNION NO. 1263, LOCAL UNION NO. 1467, LOCAL UNION NO. 9316, LOCAL UNION NO. 9205, LOCAL UNION NO. 9653, All Local Unions of DISTRICT NO. 23, UNITED MINE WORKERS OF AMERICA;

ALVIE LEROY PATTERSON;

WILLIAM CORNETTE;

ARTHUR COPE;

T. H. HUMPHREY, JR.;

KENNETH OSBURN; and

CECIL DUVALL, - - - - - *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays for a Writ of Certiorari to issue to review the opinion and order of the Court of Appeals

below vacating the injunction entered by the United States District Court for the Western District of Kentucky, Owensboro Division, and remanding the case for a dismissal of Petitioner's complaint filed in said District Court.

1. THE OPINIONS AND ORDERS OF THE COURTS BELOW ARE:

(a) The preliminary injunction dated and entered on October 25, 1968, by the United States District Court for the Western District of Kentucky, Owensboro Division.

(b) The order of the United States District Court made October 28, 1969, and entered October 29, 1968, making its preliminary injunction permanent.

(c) The opinion of the Court of Appeals for the Sixth Circuit dated and entered October 2, 1969, vacating the injunction and remanding the case for dismissal of the Petitioner's complaint.

(d) The order of the Court of Appeals entered November 18, 1969, denying Petitioner's motion for rehearing, petition for rehearing and motion for leave to file supplemental petition for rehearing suggesting the appropriateness of a rehearing *in banc.*

(e) The order of the Court of Appeals entered December 2, 1969, allowing 30 days to petition for writ of certiorari.

This petition is accompanied by the certified record from the Court of Appeals below which includes the

Complaint and Amended Complaint, preliminary injunction and order in the Trial Court; and the Opinion of the Court of Appeals for the Sixth Circuit, The Petition for Rehearing, Motion to File Supplemental Petition and for Rehearng *in banc,* and Order of the Appellate Court below.

2. THE GROUND FOR INVOKING THE JURISDICTION AND REVIEW OF THIS HONORABLE COURT ARE SPECIAL AND IMPORTANT.

Petitioner seeks a consideration and clarification of the doctrine of *Garner* v. *Teamsters Local No. 776* (1953), 346 U. S. 485.

The Court below has rendered a decision and order in conflict with a prior decision of the Sixth Circuit in *Local 332, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, et al.* v. *Grand Trunk Western Railroad Company* (CA 6—1956), 239 F. 2d 851.

Such clarification involves federal questions of substance requiring clarification by a decision of this Court. *See original and dissenting opinion* of the Court in *United Automobile, Aircraft, et al.* v. *Wisconsin Employment Relations Board* (1956), 351 U. S. 266, 76 Sup. Ct. 794. Cf. *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Company* (1969), —— U. S. ——, 89 Sup. Ct. 1109.

(a) The opinion and order of the Court of Appeals for the Sixth Circuit dated and entered October 2, 1969, and November 18, 1969, respectively, has rendered a decision in conflict with the

prior decision of the Court of Appeals on the same matter and have decided an important question of federal law which has not been but should be settled by this Honorable Court.

(b) The opinion and order of the Court of Appeals for the Sixth Circuit dated and entered October 2, 1969, and November 18, 1969, respectively, have decided a federal question in a way in conflict with applicable decisions of this Honorable Court.

(c) The opinion and order of the Court of Appeals for the Sixth Circuit dated and entered October 2, 1969, and November 18, 1969, respectively, have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Honorable Court's power of supervision.

(d) The order denying rehearing was dated and entered November 18, 1969, whereupon a stay of mandate and extension of time within which to petition for certiorari was applied for and was granted by order entered December 2, 1969, allowing 30 days for filing of petition for writ of certiorari.

3. THE QUESTIONS PRESENTED FOR REVIEW ARE AS FOLLOWS:

(a) In a diversity case filed under Title 28 USC, Section 1332, does labor have the right to engage in mass, coercive and intimidating picketing or to picket to the verge of violence, *the character of which is unlawful under state law,* protected by Section 1 and Section 4 of the Norris-LaGuardia Act (Title 29 USC, Sections 101, 104).

(b) In a diversity case filed under Title 28 USC, Section 1332, is the burden of proof upon the complainant to establish physical violence; or a breakdown of law enforcement at the state, county or city level through the testimony of law enforcement officers, as a prerequisite to a District Court's finding under Section 7(e) of the Norris-LaGuardia Act:

> "(e) that the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection" (Title 29 USC 107(e)).

(c) In a diversity case filed until Title 28 USC, Section 1332, complaining of acts and conduct entitling the complainant to equitable as well as common law relief under state law, does the complainant have the right to have his state claims adjudicated by a District Court within the limitations imposed upon its jurisdiction to grant injunctive, compensatory or punitive relief by state and federal laws.

(d) In a diversity case properly filed under Title 28 USC, Section 1332, is it an accepted and usual course of judicial proceedings by a Court of Appeals for a Federal Judiciary Circuit to reverse the District Court's finding under Section 7(e) of the Norris-LaGuardia Act made after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegation of a complaint made under oath, and testimony offered in opposition thereto *when the facts relied upon in the Appellate Court's opinion as grounds for reversal are erroneous and not supported by the transcript of the record filed with the Court.*

(1) Is it accepted and usual course of judicial proceedings for the Appellate Court to disregard the evidence before the trial court that the petitioner's employees had voted against and repudiated the union as their bargaining representative on two occasions before any injunction was issued by the trial court which had *found that Petitioner had no dispute of any kind with the union and was powerless to take any action having not failed to make every reasonable effort to terminate the picketing?*

(2) Is it accepted and usual course of judicial proceedings for the Appellate Court to disregard the facts and evidence before the District Court supporting its conclusion that absent injunctive relief, the local officials are unwilling or may be unable to furnish adequate protection; and hold that by enacting the Norris-LaGuardia Act the Congress intended that the District Courts should await the declaration on the part of local officials of their unwillingness to perform their duty and to stand by until actual bloodshed, strife and violence occur before it should lend its aid to then merely prevent a repetition of what Congress evidently intended should be prevented in the first place?

(3) Is it accepted and usual course of judicial proceedings for the Appellate Court to disregard the character of an injunctive order of the Trial Court which found that the complainant had no dispute of any kind with the union and yet permitted the full and free and peaceful exercise by the labor organization of its right of public assembly and its rights singly or in groups to acquaint the public with the facts of

its grievance or dispute, if any existed, under state and federal law and restrained only that conduct of the union which threatened or provoked violence, obstructed or attempted to obstruct ingress and egress to and from the entrances and along the roads leading to the petitioner's mine by employees, customers, railroad trains and others having legitimate business with the mine, and assaults or harassment of employees or their families on the public streets or at their private homes.

(4) Is it accepted and usual course of judicial proceedings for the Appellate Court to vacate an injunction and remand for dismissal of a complaint when state questions are involved in the proceedings and presented in the complaint.

4. THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED ARE AS FOLLOWS:

(a) Fifth Amendment to the Constitution of the United States.

(b) Judiciary and Judicial Procedure. Title 28 USC, Section 1332.

(c) Norris-LaGuardia Act. Title 29 USC, Sections 101, 102, 104, 107 and 113.

5. THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED ARE:

The Cimarron mine is located approximately five miles east of Madisonville in Hopkins County, Kentucky, and directly off Highway 1221. Coal produced by it is sold in Kentucky and elsewhere (Tr. 15). The

mine has three entrances. The main gate entrance is directly off of Highway 1221 on a county road which continues on around the property to an entrance at the back and to an entrance which is across a railroad yard (Tr. 16). The mine is served by the Illinois Central Railroad (Tr. 36). The mine normally produces for shipment approximately 3,500 tons of coal a day valued at approximately $14,000.00 (Tr. 19, 35, 73). In its operations it employs approximately $300,000.00 to $500,000.00 of equipment which costs the mine approximately $40,000.00 to $41,000.00 per month when standing idle (Tr. 37). The mine employs approximately 32 production employees (Tr. 101).

Neither prior to October 10, 1968, nor after that date, did the Union carry any signs or make a formal or informal demand upon Cimarron based upon any claim hat Cimarron was unfair, that a representation question concerning its employees existed, or that the Union represented the Cimarron employees (Tr. 61).

On October 10, 1968, the respondents and others in concert with them, from Union locals at various other mines in Hopkins County, Kentucky, employing more than 1,000 men, appeared at the entrances of the Cimarron mine en masse. The situation, as described by Mr. Anderson, President of Cimarron, upon his arrival at the scene was to find twenty-four of his employees standing in a group approximately 500 yards from the main entrance and between them and the entrance extended a line of 30 to 40 vehicles parked on both sides of the road extending from walking distance of the entrance to approximately a quarter of a mile

back with approximately 100 to 125 men massed in large groups between the highway access to the mine and 50 feet of its main gate (Tr. 21, 24, 25, 27, 29, 44, 66, 72, 73, 106, 107). Anyone wanting to enter any entrance to the mine would have to go through the gauntlet of parked vehicles and men to do so (Tr. 29). Mr. Anderson was allowed to go through in his car, approached the person in charge, one Alvie Leroy Patterson, a respondent, who advised him that they were closing down the mine and would not allow it to operate because it was not connected with the Union, and that an attempt was going to be made to unionize it (Tr. 26). Mr. Anderson went to each of the entrances to the mine and found massing at each one although there were fewer numbers at the back entrance and the railroad entrance (Tr. 27, 44, 45). None of the individuals grouped at the mine entrances were employees of the Cimarron mine (Tr. 25, 66, 67, 68, 85). While Mr. Anderson was present, a meeting was called between the 24 Cimarron employees and an opposing task force consisting of Mr. Patterson accompanied by 10 men (Tr. 22, 23, 107-108). Mr. Anderson was asked to leave and he agreed to this when Mr. Patterson agreed to move the main body of his massed men back out of hearing distance of his employees (Tr. 23, 41, 42, 62, 63, 64, 108, 109, 110). Mr. Patterson then handed out Union cards and paper to the men and conducted a vote among the Cimarron employees and they voted against joining the Union (Tr. 23, 24, 25, 41, 109, 112). Although the activities of the Union were peaceful except for language when Cimarron's supervisory per-

sonnel, including Mr. Anderson, were allowed to pass through the lines, the calmness vanished and it was a different story if the Cimarron employees tried to enter and the roads were blocked and he thought they would have safe conduct through the lines, this just didn't seem right to the employees since they were greatly outnumbered and he gave the employees permission to leave (Tr. 30).

After the vote conducted by the union on October 10, 1968, the Cimarron mine was subjected to the same massing of men and vehicles from October 11, 1968, until October 25, 1968, the date of the hearing; and, except for a very limited operation on October 22, 1968, when a token of the employees were able to use a secluded entrance off of Highway 70 and 85 from the county roads, the mine remained idle as efforts to resume operations were futile (Tr. 35, 36, 49, 77, 79). Orders for coal were canceled due to lack of production (Tr. 37). On the one day the mine operated, October 22, 1968, only 12 employees succeeded in entering the mine through the secluded entrance to work and only 500 tons of coal were produced (Tr. 25, 73). The massing of men was then increased at the west entrance where the 12 men had entered (Tr. 77). The Illinois Central Railroad was prevented from removing any coal mined on two occasions, being allowed only to maneuver cars within the railroad yard (Tr. 36, 53, 60). On one occasion when the Union was not present, supervisory personnel moved coal out of the mine (Tr. 36, 53). When the new contract with the Union mines was agreed upon on or about October 14, 1968, all the

other mines returned to work and the leadership of the Union mass picketing at the Cimarron mine changed from Alvie Leroy Patterson to Allen Condra and Charles Head, organizers and representatives of the Union and District 23 of Madisonville (Tr. 39, 40). The supporters grouped at the entrances were still being recruited from other union locals (Tr. 119, 138, 140, 141, 142).

On October 14, 1968, all other miners having returned to work and it being obvious that there was no dispute between Cimarron and its employees because the Union had conducted its vote on October 10th among the Cimarron employees which the Union had lost; and, therefore, after said date did not represent or make any further claim to represent the Cimarron employees; Cimarron filed its original Complaint alleging that no labor dispute existed between it and Respondents and asked for injunctive relief setting the original hearing for October 17, 1968, which was then postponed at the request of the Union until October 25, 1968.

After October 10, 1968, the date of the vote, the Union carried no signs and made no oral or written claim to Cimarron to represent or desire to represent the Cimarron employees (Tr. 61). The Union gave no publicity to any dispute, if any existed, but nevertheless the massing of men and vehicles at the mine entrances continued to the date of the hearing (Tr. 35, 36). The representation question had been settled so far as the Union and Cimarron were concerned with the vote taken on October 10, 1968, when Mr. Anderson made

efforts to terminate and settle the matter and he and Mr. Patterson established the guidelines for Mr. Patterson to conduct the balloting among the Cimarron men (Tr. 40). Mr. Patterson was at the time speaking for all of the massed men (Tr. 42). On October 24, 1968, the day prior to the hearing on October 25, 1968, the Cimarron men made their own effort to settle and terminate the matter and called their own meeting and asked that Union representatives and Company representatives absent themselves from it (Tr. 23, 24). The meeting was held in a City Park at Madisonville, Kentucky, and only Cimarron employees were present at which time 29 out of the 32 employees attended and the vote against the Union was 18 to 10 (Tr. 100, 101). Nevertheless, the Union had its massed men and vehicles at the mine entrances the next day which was the date of the hearing, October 25, 1968 (Tr. 34, 35).

The events which led up to this final vote by the Cimarron men were as follows: Some unidentified threats were made to employees at their homes and upon their attempts to enter the mine (Tr. 55, 56). When the other surrounding mines terminated their dispute with the Union and returned to work, Cimarron, still being mass picketed, made preparations to reopen its mine for production on the following Monday, October 21, 1968, by notifying the law enforcement officers of Hopkins County on the preceding Saturday, October 19, 1968, of its request for protection of its property and the lawful rights of its customers, railroad trains and employees for free ingress to, and egress from, its mining properties and along

the public roads (Tr. 32, 33, Exhibit A). Mr. Anderson visited the site when his employees started arriving for work the morning of October 21, 1968, and in his car, with his employees in cars behind him sought to move through the line and although his car was allowed to go through, his employees' cars were blocked and two turned around blocking the other cars' passage (Tr. 30, 31, 52). Mr. Elmer Cane's car was blocked by 15 or 20 men, his doors opened, cursed and turned around (Tr. 97). Seeing that the same conditions existed he notified the Sheriff's office and the State Patrol and in thirty minutes one one-man Sheriff's car and one two-man State Patrol car arrived and the two cars cruised or circled the property on the State and County roads (Tr. 33, 34, 79). Only one car got through at the time the State Patrol cruiser arrived and the road was cleared (Tr. 31, 53, 80, 81). The Sheriff's car was at the site only once that day (Tr. 50). The Union forces worked or congregated in the center of the highway stopping traffic, keeping the roads clear only when the patrol cars were on the scene or within talking distance (Tr. 33, 34, 45, 46, 51). When the patrol cars were absent although in the area cruising the entrances on the country road, the men of Cimarron were not allowed to enter (Tr. 51). The Cimarron men were told by such a number and in such a manner that they had better not consider working that day (Tr. 57). It became apparent that the mine could not be operated with the men who could obtain entrance and the employees left, the crowd dispersed and the law officers left (Tr. 34). Although the Sheriff's office was called once each

day on October 21st and 22nd and twice on October 23rd, its car came once on October 21, 1968 (Tr. 50, 51). However, the presence of the officers and their road patroling was ineffective to reopen the mine (Tr. 34).

The first of three attempts to enter the mine, after notice to the law enforcement officers of Hopkins County, was made on October 21, 1968, and it was blocked. A second attempt was made at a different entrance on October 22, 1968, and was partially successful, but only a small group of 12 men made it and produced only 500 tons of coal (Tr. 35, 72, 73, 78, 98, 99). This entrance was more heavily guarded the next day (Tr. 77). The third and last attempt to enter was made on October 23, 1968, the date prior to the vote conducted by the Cimarron men at the public park in Madisonville on October 24, 1968, and the men were again turned back because the roads were blocked (Tr. 90, 91, 92).

The law enforcement officers were served with a notice of the hearing on October 25, 1968, but did not appear (Tr. 37, 38, Exhibit B, 89).

This was the evidence at the hearing on October 25, 1968, at which witnesses testified in open court, subject to cross-examination; and upon which the Court based its preliminary findings. Although the parties were allowed an opportunity to present additional proof, the Court was advised that no additional proof would be offered and it thereupon made its preliminary injunction permanent.

The massed pickets carried no signs, made no claim that Cimarron was unfair or that they represented or

desired to represent the Cimarron men after October 10, 1968. The initial reason which was given for the Union activities at the Cimarron mine by its representative, Mr. Patterson, who was in charge of the pickets and who left on October 14, 1968, when all other miners returned to work, was "to have those Cimarron men to respect their picket lines and join our organization" (Tr. 105, 113, 120). However, after the Union conducted the vote on October 10th among the Cimarron men and the miners returned to work on October 14, 1968 and Mr. Patterson left, nowhere in the record does it appear that the Union had any purpose or reason "except respect for its picket lines" or that the Union told the Cimarron men, the railroad serving the mine, or anyone else desiring to enter the mine that they and their vehicles were free to pass through the pickets massed at the entrances to the mine. Further, this permission was not given any day the law enforcement officers were in the area although the officers cleared the road when present or in talking distance. The law enforcement officers made no efforts to escort any Cimarron men through the picket lines. *Nowhere in the record does it appear that after October 10th, 1968 the Union carried signs or gave publicity to any facts, existing or involved, or made any claims of unfairness or representation in its dealings with either the Cimarron mine or its employees which had repudiated 1968, and again on October 24, 1968, by an employees' vote conducted at a public park.* Nevertheless it continued the massing of its men and vehicles at the mine

entrances and effectively obstructed ingress to, and egress from, the mine.

Petitioner in a diversity of citizenship case filed, under Title 28 USC, Section 1332, its original complaint on October 14, 1968, in the United States District Court for the Western District of Kentucky, Owensboro Division, alleging that Respondent, herein called Union, had engaged in unlawful mass picketing intimidating and barring lawful ingress to, and egress from, its mine in Hopkins County, Kentucky, by its employees, railroad trains serving its property, and others having legitimate business there commencing on October 10, 1968; and that there was no labor dispute between Cimarron and its employees or between Cimarron and the Union, from all of which it was suffering grave and irreparable damage and was powerless to take any action resulting in the termination of the unlawful activities for which it prayed injunctive and general and special relief.

The Union, which had been engaged in a strike against other mines in Hopkins County and elsewhere, terminated its dispute with those mines on or about October 14, 1968, and all of said mines resumed operations. Nevertheless, the massing of pickets at the entrances of the Cimarron mine and on the roads leading thereto continued. The mass picketing prevented the free and unobstructed operation of the mine, prevented the free and unobstructed transportation of coal by railroad trains from the property, and prevented the free and unobstructed ingress and egress of employees, customers and others having legitimate business with

the mine. In efforts to terminate the Union activities the Cimarron employees voted on two occasions against the Union as their bargaining representative; the first time in an election conducted by the Union at the mine site in the presence of the massed pickets; and the second time in a public park in the small community of Madisonville, Kentucky. After the first vote the Union continued its massed action at Cimarron's three separate entrances to its property, on the public roads leading thereto, and at the railroad tracks provided for transportation of its coal and Cimarron believing that it had no labor dispute with the Union sought the protection of the law enforcement officers of Hopkins County for its employees and others to freely enter and leave its mining property. The law enforcement officers were fully informed of Cimarron's need for protection commencing October 21, 1968, but did not appear on that date until called and then only one one-man Sheriff's car and one two-man State Patrol car appeared. The law officers, three in number in two cars, made no efforts to escort employees' vehicles through the lines and the only effect of the officers' presence, when they did appear, was to open the roads just wide enough to permit passage single-file down a gauntlet of 100 men and 30 to 40 vehicles standing and parked at the sides of the road while the officers remained on the scene, the men closing in to prevent passage when the officers left to patrol other mine entrances and turned cars of Cimarron employees around to block the passage of other employees in vehicles waiting in line for passage through; and on occasion, opening the

doors of Cimarron vehicles and using epithets calculated to have the Cimarron men respect the Union's picket lines.

In this posture Cimarron filed its amended complaint again alleging that neither it or its employees who had rejected the Union, were party to a labor dispute with the Union which did not claim to represent its employees and that its efforts to reopen its mine after requesting the law enforcement officers of the state and county to furnish adequate protection to it and its employees and others in entering and leaving the mine, were ineffective; further alleging that the law enforcement officers were unable to afford it and its employees the protection to which they were entitled and that it had served notice of the proceedings and hearing upon the law enforcement offices as required by Section 7 of the Norris-LaGuardia Act (Title 29 U.S.C., Section 107).

The hearing upon the original complaint had been set by the District Court for October 17, 1968, and was reset at the Union's request for October 25, 1968, and this date was noticed to all parties including the law enforcement officials.

On October 25, 1968, the trial Judge heard the evidence introduced by witnesses in open court, with opportunity for cross-examination, in support of the sworn allegations of the amended complaint and the testimony of witnesses in opposition thereto, with opportunity for cross-examination and upon the entire record, the Court made and filed its written findings of fact as required by Title 29 U.S.C., Section 107, and

entered its preliminary injunction, including among its findings paragraphs (e), (f) and (g) which are as follows:

> "(e) That public officers charged with the duty to protect complainant's property have been called upon to furnish such protection and are unable or unwilling to furnish adequate protection.
>
> "(f) That the persons who have been engaged in such picketing, including the defendants named in the caption, are not employees of the plaintiff and no employees of the plaintiff are represented by the individuals or the local unions named as defendants.
>
> "(g) That plaintiff *has no dispute of any kind* with said pickets or their local unions, or with any person associated with them, and by reason thereof, plaintiff is powerless to take any action which would result in a termination of said unlawful, intimidating and coercive mass picketing and that plaintiff has not failed to make every reasonable effort to terminate said picketing." (Emphasis supplied.)

The preliminary injunction was entered at the conclusion of the hearing on October 25, 1968, conditional upon bond in the amount of $5,000.00 which was filed. On October 28, 1968, the Trial Court entered its order making the injunction permanent after being advised by counsel for the parties that neither party to the action had any additional proof to offer.

From the last order the Union appealed and under Rule 30(c) of the Sixth Circuit prepared an appendix with important serious errors which were served after

briefs were filed and which the Union counsel agreed to correct in the presence of the Appellate Court. It appears, in spite of a statement in the opinion to the contrary, that the correction, though agreed upon, was not accepted by that Court. Petitioner being aware of the obvious errors of fact recited in the opinion written by the Court of Appeals for the Sixth Circuit and entered October 2, 1969, filed its petition for rehearing believing that the Appellate Court had overlooked or misapprehended the facts and law of the case and sought to file a supplemental petition for rehearing suggesting the appropriateness of a hearing *in banc.*

On November 18, 1969, Petitioner's motions for rehearing were denied, the Court in its order denying said motions applying the policy of strict conformity (29 USC, Section 101) to Section 7 of the Norris-LaGuardia Act providing in part:

> "No Court of the United States shall have jurisdiction to issue a temporary or permanent injunction *in any case involving or growing out of a labor dispute, as defined in this chapter* . . . except after findings of fact by the Court to the effect . . .
>
> * * * * * * *
>
> "(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection." 29 USC 107. (Emphasis supplied.)

The Appellate Court below did not address itself to the fact that the Trial Judge had found that there was *no dispute of any kind with the Union or its pickets.*

The Appellate Court commented in its order that its opinion may not be read as "upholding" violation of any law of the State of Kentucky which its law enforcement agencies are charged with enforcing; *that the nature of the injunction issued is irrelevant where the Court has no jurisdiction to issue any at all;* and that the Appellate Court was made fully aware of the error in the appendix prepared under its rules *concerning the terms of the injunction as finally entered by the District Judge and had read and considered the entire transcript of the hearing before him (sic) before deciding this case.* Thus, the Appellate Court left its opinion entered October 2, 1969, without change, as its product. The relevant facts upon which this opinion is based are stated as follows (page 2):

> "The facts show that Cimarron Coal Corporation operated a nonunion mine in Hopkins County, Kentucky, employing approximately 30 miners. In October of 1968, the United Mine Workers were striking mines in Hopkins County where they had had bargaining rights. They had never had a contract with Cimarron nor does this record make any showing of any union membership."

The relevant facts overlooked or misapprehended by the learned court are that the Union had ceased its strike on October 14, 1968, as to all mines but Cimarron; and, that the Union's strike was over its contracts with all the other mines struck by it, but had been denied bargaining rights by the Cimarron employees in a vote conducted by the Union on October 10th in the presence

of its massed men and vehicles and thereafter made no claim for representation of those employees.

Next, the opinion recites (page 2):

> "Beginning on October 10 and continuing until October 25, 1968, when this injunction was entered, the United Mine Workers undertook to organize Cimarron Coal Corporation by the expedient of appearing in front of the plant gates *with 75 to 100 pickets and picket signs.*" (Emphasis supplied.)

The relevant facts overlooked or misapprehended by the Appellate Court are that the Union used 100 or more men with 30 to 40 vehicles at one mine entrance with lesser numbers at its other widely separated entrances all located out in the country five miles east of the Town of Madisonville, Kentucky; that the men of the Cimarron mine had by October 24, 1968, again rejected the Union as their bargaining representative by a second vote conducted in a public park in the Town of Madisonville; and *the relevant facts stated in the opinion that "picket signs" were borne by the pickets are an absolute error not supported in the transcript containing 169 pages.*

Next, the opinion recites (page 2):

> "Cimarron Coal thereupon wrote the State Police and the local Sheriff asking for protection. The Sheriff and *some* state police did appear and *some* of the employees did go in to work. From the record it would appear that there was *something less* than a complete mobilization of law enforcement. There was, however, no failure on the

part of law enforcement officials *to respond, no testimony from any law enforcement official offered before the District Judge pertaining to any breakdown of local or state law enforcement and no property damage or physical assault upon anyone.*

"The thrust of Cimarron's case for federal injunctive relief is that the mass picketing constituted 'violence' within the meaning of Section 4 of Norris-LaGuardia and that the limited response of local and state police met the conditions of Section 7(e) of that Act."

The relevant facts at transcript 30, 31, 32, 33 (Exhibit A), 34, 35, 37, 38 (Exhibit B); 46, 50, 51, 52, 55, 56, 72, 73, 77, 78, 80, 81, 85, 90, 91, 92, 98, 99, were overlooked or misapprehended by the writer of the opinion as he took out of context certain of the Trial Judge's remarks in summarizing approximately 169 pages of recorded testimony. It does not appear that the learned Appellate Court appropriately considered the evidence in the record, as stated in its order of November 18, 1969, which is that although the law enforcement officers were presented written requests, personally delivered to them on October 19, 1968, they did not appear when the Cimarron men started arriving for work on October 21, 1968. When the Cimarron men sought to go through the 100 massed pickets and vehicles, their cars were blocked and two cars turned around blocking the cars behind them (Tr. 30, 31, 32, 33, Exhibit A, 52). One employee, Mr. Cane, was blocked by 15 to 20 men, his doors opened; he was cursed and turned around (Tr. 97). The Sheriff and State Patrol

had to be called and it took 30 minutes for one sheriff's car and one two-man state patrol car to arrive and with three widely separated entrances to keep open, the two cars could not patrol all three entrances and had to circle the property on the county roads (Tr. 33, 34, 79). Only one Cimarron car got through when the State Patrol cruiser arrived and cleared the road at the main gate of the mine (Tr. 31, 53, 80, 81). The Sheriff's car made only one appearance that day (Tr. 50). While the law officers patrol cars were not present, the Union forces walked or congregated in the center of the roadways stopping traffic and kept the road clear only when the officers' patrol cars were on the scene or within talking distance (Tr. 33, 34, 45, 46, 51). When the patrol cars were absent in the area cruising the other entrances on the county road, the men of Cimarron were not allowed to enter (Tr. 51). Although the Sheriff's office was called once each day on October 21st and 22nd and twice on the 23rd of October, it made only one appearance on October 21, 1968 (Tr. 50, 51). This is the record upon which the learned Appellate Court, after reviewing the transcript, wrote (page 2):

> "The Sheriff and some State Police did appear and some of the employees did go into work."

The relevant facts regarding "some" of the employees who did go into work were also overlooked or misapprehended by the Appellate Court. Three attempts were made to enter the mine. The first was made October 21, 1968, and it was blocked one car getting

through. A second attempt was made on October 22, 1968, at a little used entrance, but only 12 men got through and this entrance was thereafter more heavily guarded by the Union (Tr. 35, 72, 73, 77, 78, 98, 99). The third and last attempt was made on October 23, 1968, the date just prior to the vote conducted by the Cimarron men at the public park in the Town of Madisonville on October 24, 1968, and the men were blocked (Tr. 90, 91, 92).

The learned Appellate Court stated (page 4):

> "We think this record indicates *only pro-forma requests* by Plaintiff-Appellee for protection and that it fails to demonstrate either *inability or unwillingness of state law enforcement to respond.*" (Emphasis supplied.)

The relevant statistics in the transcript of the record of this case upon the "appearance" and "response" of the law enforcement officials are that after being given notice of the need for protection and calls each day for protection, out of three days running the Sheriff showed up one time the first day, and the state police sent a two-man patrol car to patrol roads giving access to three widely separated entrances and to supervise the activities of over 100 pickets at one gate with varying numbers at the two other gates of the Cimarron mine. The roads would be temporarily cleared but no escort was provided to go through the gauntlet of men and cars. *The response was truly meager and sporadic.* But meager and sporadic response when a business is closed down and its employees are out of work most surely *establishes that pro-*

tection is not adequate as well as inability or unwillingness on the part of officials to furnish adequate protection, and it is "adequate protection" and not "response" which the Trial Judge must make the basis of his finding required under Section 7(e) of the Norris-LaGuardia Act (Title 29 USC 107(e)). Further, the relevant facts concerning the "pro-forma" requests for protection are: (1) a written request exhibited to the court specific as to date, time and location, personally delivered to the law enforcement officers; and (2) repeated calls for their intercession. In a community the size of Madisonville, long a stronghold of union activity in the mine fields, the public law officers would also surely know other relevant facts when its public park is the site of a gathering of men to vote against the Union as their bargaining representative.

Finally, although the Appellate Court in its order entered November 18, 1969, stated that the Court *was fully aware of the error in the appendix concerning the terms of the injunction as finally entered by the District Judge* (page 2), *it is evident that it gave no consideration in its opinion or in its order to the Trial Court's findings (f) and (g) contained therein:*

> "(f) That the persons who have been engaged in such picketing, including the defendants named in the caption, *are not employees of the plaintiff and no employees of plaintiff are represented by the individuals or the local unions named as defendants.*
>
> "(g) *That plaintiff has no dispute of any kind with said pickets or their local unions, or with any*

> *person associated with them and by reason thereof,* plaintiff is powerless to take any action which would result in a termination of said unlawful, intimidating and coersive mass picketing, and that plaintiff has not failed to make every reasonable effort to terminate said picketing." (Emphasis supplied.)

Thus, the learned Appellate Court failed *to consider in its entirety the full thrust of petitioner's case* that: there was no "labor dispute" as defined in Section 13 of the Norris-LaGuardia Act (Title 29 USC 113); that the "strict conformity of Section 1 of that Act was inapplicable under the circumstances of this case; that the Trial Court in a diversity of citizenship case had carefully preserved the rights of all of the parties under both state and federal law by the terms of its injunction; that such massing of over 100 men and many vehicles *without signs* in this Hopkins County rural community where few members of the public would be expected to pass for information concerning the Union's grievance coupled with the well known historic background of the Union in conducting its picketing activities to requesting "respect for our picket lines" referred to by the Trial Court at pages 157-158 of the transcript spoke in the language of intimidation, coercion and "violence," threatened and imminent, to the mere 30 employees of the Cimarron mine; and that "adequate protection" by law enforcement officers is that protection which can and does afford a free, uncoerced, unintimidated and continued exercise of tangible and intangible rights, as opposed

to protection which was so inadequate and so sporadic (as to number, response and effectiveness) that so long as the Union stood at the Cimarron entrances with its massed men and vehicles upon the verge of actual physical violence and fraud *without signs and in impressive number five miles out in the country,* neither Cimarron or its employees were able to exercise any of their tangible and intangible rights under state and federal law.

Thus, the Appellate Court passed up the "thrust" of Cimarron's case as to: the terms of complaint and the preliminary injunction; the right of the trial Court to grant injunctive relief where no "labor dispute" exists; the rights of Cimarron to injunctive and general or special relief under state and federal law in a diversity case; the unlawful character of mass picketing activities under state law under the circumstances of this case in a context of "violence" and "overt threats of violence," and, held that the meager, ineffective, and sporadic response of law enforcement officials, *absent a showing of property damage, physical assault or a breakdown of law enforcement, the latter to be testified to by the law enforcement officials,* establishes, contrary to the Trial Court's specific finding, that the law enforcement officials were both able and willing to afford "adequate protection" to Cimarron and its employees.

Petitioner believes that the Court of Appeals for the Sixth Circuit has committed error and overlooked or misapprehended the constitution and statutes of the United States, the decisions of this Honorable Court,

and, the decisions of other lower state and federal courts in rendering its opinion and order in conflict therewith and in passing upon an important question of federal law which has not been, but should be settled by this Court; and, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervision.

6. ARGUMENT.

FIRST QUESTION.

Did a "Labor Dispute" as Defined in Section 13 of the Norris-LaGuardia Act Exist Between Cimarron, Its Employees and the Union?

The District Judge said no. The Appellate Court overlooked or misapprehended the question.

This Honorable Court has approved the principle that an employer's refusal to accede to any unauthorized and unwarranted demands, does not constitute a "dispute" within the meaning of the Norris-LaGuardia Act, restricting injunctions in labor disputes. *Donnelly Garment Co.* v. *International Ladies Garment Workers Union* (DC Mo. 1938), 21 F. Supp. 807, vacated on other grounds 304 U. S. 243, cert den. 305 U. S. 662. Cf. *Converse* v. *Highway Const. Co. of Ohio* (CA 6, 1939), 107 F. 2d 127.

In *United Electric Coal Companies* v. *Rice* (DC Ill. 1938), 80 F. 2d 1, a controversy between two unions to which the employer and its employees were not a party, resulted in the granting of an injunction as to which certiorari was denied 297 U. S. 714. In *Edward*

Lauf v. *E. G. Shinner & Co., Inc.* (1938), 303 U. S. 323, this Honorable Court, *dealing with peaceful picketing and advertising of facts of a labor dispute between disputants who did not stand in the proximate relation of employer and employee, stated:*

> *"A Wisconsin Court could not enjoin acts declared by the Act to be lawful; and the District Court has no greater power to do so.* The error into which the Court fell as to the existence of a labor dispute led it into the further error of issuing an order so sweeping as to enjoin acts made lawful by the State Statute. *The decree forbade all picketing, all advertising that the respondent was unfair to organized labor and all persuasion and solicitation of customers or prospective customers not to trade with respondent."* (Emphasis supplied.)

The right of Kentucky Courts to enjoin picketing to force employees to join a union against their will was upheld by this Honorable Court in *Blue Boar Cafeteria Company, Inc.* v. *Hotel and Restaurant Employees and Bartenders International Union Local No. 181* (1952), 312 Ky. 288, 254 S. W. 2d 335, cert. den. (1953) 346 U. S. 834. The Kentucky Courts in the exercise of their equity jurisdiction recognize the limits of their injunctive powers over nonviolent and nonmass "peaceful" picketing. Cf. *Boyd* v. *Deena Artware, Inc.* (1951), 217 Ky. 919, 239 S. W. 2d 86; *Allen Bradley Local No. 1111, et al.* v. *Wisconsin Employment Relations Board, etc.* (1942), 315 U. S. 740; *Garner* v. *Teamsters Local No. 776* (1953), 346 U. S. 485.

In this case the massed pickets did not advertise any labor matter and did not carry signs; and there was no evidence introduced that a controversy existed over wages or conditions of employment between Cimarron and the Union, or Cimarron and its employees after October 10, 1968. At the outset, the Union sought to have "those Cimarron employees to respect their picket lines and join our organization." The employees had rejected the Union by two elections, one conducted by the Union and one conducted in a public park by the employees themselves in the Town of Madisonville. Cimarron and the employees of Cimarron thereby had foreclosed any controversy or dispute over voluntary association with, or representation by, the Union. In Cimarron's sworn complaint and amended complaint it alleged that it had no "labor dispute" with the Union or its employees, and the proof addressed at the hearing was clear and convincing that the Union's only purpose for its unlawful acts of picketing in masses was to close the Cimarron mine to its customers, railroad trains, employees, and others with no claim or advertised purpose or grievance or dispute. *These were unwarranted and unauthorized demands and prompted the District Judge to include in his findings that there was no dispute of any kind between Cimarron, the pickets, or their local unions, or with any person associated with them.*

It was error for the Court of Appeals to vacate the injunction which permitted peaceful picketing even if it would be for the unlawful purpose under state and federal law to coerce employees in their rights to fully

choose their representation and remand for the dismissal of Cimarron's complaint and amended complaint. The District Court in this diversity case could have granted the same injunctive relief under state law without the limitations upon its jurisdiction imposed by Section 7 of the Norris-LaGuardia Act because no "labor dispute" existed as defined in Section 13 of said Act. Further, upon its sworn complaint and amended complaint and actual proof of massing of pickets, threatened violence, coercion, and, intimidation, which violated state common law, Cimarron *was entitled to have its remedies and relief under state law completely adjudicated by the District Court under its prayer for general and special relief within the "permissible scope of state remedies." United Mine Workers of America* v. *Gibbs* (1966), 383 U. S. 715, 86 S. Ct. 1130; *Youngdahl* v. *Rainfair, Inc.* (1957), 355 U. S. 131, —— S. Ct. ——.

The action of the Appellate Court below vacating the injunction and dismissing the complaint and amended complaint denies Cimarron due process of law under the Fifth Amendment to the Constitution of the United States in its diversity case, and decides an imporant question of federal law in conflict with applicable decisions of this Court.

SECOND QUESTION.

Is "Physical Violence" and a Breakdown of Law Enforcement At the State, County and City Level Established By the Testimony of Law Enforcement Officials Necessary to Establish the Finding Under Section 7(e) of the Norris-LaGuardia Act:

(e) That the Public Officers Charged With the Duty to Protect Complainant's Property Are Unable or Unwilling to Furnish Adequate Protection (Title 29 USC Section 107(e)).

The Court of Appeals below said *yes*. Petitioner contends that the answer is *no;* and, that the District Judge acted within the permissible functions of a Trial Court to weigh the evidence and make the determination in the way Congress intended for Trial Courts to make it. The Trial Courts of the Seventh and Eighth Judicial Circuits have dealt squarely with the issue of sufficient "proofs" to support the required finding. In *General Electric Company* v. *Cojack* (1946) (USDC N.D. Ind.), 68 F. Supp. 686, and, in *Cupples Company* v. *American Federation of Labor* (1937) (USDC Mo.), 20 F. Supp. 893, the Trial Courts pondered the problem and announced their opinion that sufficient proof fell into three (3) categories *if the Congressional intent was not to be thwarted.* Facts and evidence justifying the finding were: (1) a definite declaration on the part of the public officials; (2) actual bloodshed or violence after cooperation by public officials; and (3) the Court's justifiable conclusion that absent injunctive relief, the local officials are unwilling or may be unable to furnish adequate

protection. *These Courts believed that Congress never intended that a Trial Court, compelled to proceed with dispatch in irreparable injury matters, should await the declaration on the part of public officials of their unwillingness to perform their duty. Nor, did Congress intend that the Trial Courts stand by until actual bloodshed, strife, and violence occur before it should lend its aid to them merely prevent a repetition of what Congress evidently intended should be prevented in the first instance.*

Although we believe no "labor dispute" existed in this case and that the District Court sitting as a state court in this diversity case, could have issued its injunction without a finding under Section 7(e) of the Norris-LaGuardia Act (Title 29 USC 107(e)), the record of the proceedings in the District Court conclusively established a justifiable conclusion that the local officials were unwilling or unable to furnish adequate protection and the Trial Court so found. The fact that the Sheriff of Hopkins County sent one, one-man patrol car on one day after having received a written demand for protection from Cimarron as well as several calls each day, shows neither willingness nor ability to furnish adequate protection to Cimarron property or to the 30 Cimarron employees who wanted to work. The facts that only one two-man State Uatrol car appeared after the written demand for protection was made and then only after calls were made each day for opening the gates and that said patrol car devoted itself only to patroling to clear the road surrounding the mine property without providing any escort

through the gauntlet of massed men and vehicles, show neither willingness nor ability to comply with Cimarron's written demand for protection of its property and 30 employees who wanted to work. Especially is this apparent when the evidence showed that even when the patrol car was in the vicinity, cars of Cimarron employees were turned back by the massed pickets, one employee's car doors opened by several of the pickets who used epithets and that the massing to obstruct the roads and entrances was resumed in the absence of the patrol car.

Picture a mine operation on property located 5 miles from town with three widely separated entrances reached by county roads off of state highways with over 100 men and 30 to 40 vehicles parked on each side of the road massing at the main entrance without signs or advertising, other than the ominous presence of numbers and varying numbers of men and vehicles massing at the other entrances with one patrol car which is only capable of keeping the road cleared at one entrance at a time while on the scene or within talking distance at said entrance. There was also evidence that employees had received threats at their houses. This was what caused the District Judge to say about the adequacy of law officers protection (Tr. 159-162):

> "It appears that they cleared the roadway, however, even when they were in the general vicinity, the plaintiff's proof shows that two vehicles of employees were turned back. This is indicative to me that the public officials made *no real meaningful*

response insofar as escorting or offering to escort or insuring protection to any plaintiff employee who wished to drive between the parked cars and the large number of defendant's associates there gathered.

"It is not what happens when the law enforcement officers are actually present, as the defense counsel seems to rely; if the freedom of action of the plaintiff's employees is at other times (Transcript 160) prohibited by the defendants, and my reaction to this case, gentlemen, is that it is one viewed by me to be extremely marginal in chinning the bar of legal requirements of Section 107 when viewed in the light of occurrences there weighed in the balance of the unquestioned right of the mine workers to peacefully assemble and espouse the cause of their Union fraternity.

"*For this reason, of course, I feel compelled to deny the temporary injunction in the form tendered to me by the plaintiff as it appears far too broad in scope.* I will, however, grant an order restraining the defendants in this activities at the plaintiff's mine from massing in large groups or from using or employing more than four persons at any one time in the act of picketing at any single entrance to the plaintiff's mine in Hopkins County, or said another way, of using more than a total of twelve persons at any given time in the picketing of the three entrances to the mine proper, and require that no more than two of said pickets at any one place be standing at a distance of closer than five feet to one another and that their picketing activities not be conducted in such a manner as to block or impede the (Transcript 161) use of the entrances and the exits to said mine *and that*

they be possessed of placards indicating themselves to be pickets and the purpose of their picketing.

"I enjoin them from the stopping of any vehicles or attempting to ingress or egress from this mine property, *which includes the employees of the plaintiff or any person, customer or train attempting to move to or from the property.*

"Likewise, the order shall enjoin any assault or harassment of any employee of the plaintiff or any member of his family on or about the public streets or at private homes of such employees.

"Now, gentlemen, by this very limited order, an order which I am confident the defendants can clearly obey *without any undue limitation being placed upon their organizational influence if it truly, in fact, genuinely exists and the plaintiff's employees do, in fact, wish to become members of the defendants' union;* the Court feels that the Union, as Mr. Patterson expressed it, really has no objection to the employees entering their place of employment if they wish to, provided they are informed enroute that the Union wishes to organize this coal mining (Transcript 162) operation." (Emphasis supplied.)

Thus, upon sworn evidence and sufficient "proofs" of acts of violence or overt violence and abuse after the ineffective and sporadic cooperation of law enforcement officers, the Trial Court reached a *justifiable conclusion;* upon the facts and circumstances of this case, establishing no "labor dispute" and the Cimarron employees' rejection of the Union on two occasions; *that absent injunctive relief which preserved the rights of the Union to peacefully assemble and espouse the*

cause of their Union fraternity unquestioned under either state or federal law and which permitted it to use its organizational influence under Section 13(c) of the Norris-LaGuardia Act (Title 29 USC 113(c)), if it:

> ". . . *truly, in fact, genuinely exists and the plaintiff's employees did, in fact, wish to become members of the* defendants' union." (Emphasis supplied.)

the local law officers were unable or unwilling to furnish adequate protection and made its finding under Section 7(e) of the Norris-LaGuardia Act (Title 29 USC 107(e)).

The Trial Judge upon entry of its preliminary injunction on October 25, 1968, gave the parties further time to submit additional proof and when advised by counsel that there was none, made the injunction permanent by order entered October 28, 1968.

Thus, the District Court sitting as a state court acted judicially and squarely to recognize the rights of the parties under state and federal law and to permit a continuation of peaceful picketing and publicity to a "labor dispute" within the rules approved by this Honorable Court in the *Donnelly, supra; United Electric Coal Companies, supra; Lauf, supra; United Mine Workers of America, supra;* and *Youngdahl, supra,* cases; and by the Kentucky Courts in the *Blue Boar, supra;* and *Boyd, supra,* cases. Further, the Trial Court rested its finding under Section 7(e) of the Norris-LaGuardia Act judicially and squarely within the evidence ambit of the *General Electric Company,*

supra, and *Cupples Company, supra*, cases out of the Seventh and Eighth Circuits.

The Appellate Court below has overlooked or misapprehended the facts and the law of this case by reversing the Trial Judge's justifiable conclusion, necessary for a finding under Section 7(e) of the Norris-LaGuardia Act; and by remanding for dismissal of the complaint without further hearing, has invaded the province of the Trial Court and created confusion among its Trial Courts and those of the Seventh and Eighth Circuits. From the Appellate Court's opinion and order, it would appear that Congress intended that blood must run in the streets, property must be destroyed, law enforcement officers must completely mobilize and patrol round the clock and testify or certify as to a breakdown of law enforcement at the local level before a United States District Judge sitting in a diversity case and applying state law entitling the complainant to speedy relief and remedies can grant any relief under the "strict conformity" and specific findings required of it under Section 1 and 7(e) of the Norris-LaGuardia Act (Title 29 USC, Section 101 and 107(e)).

Thus, the Appellate Court below has decided an important question of federal law which has not been, but should be, settled by this Honorable Court.

THIRD QUESTION.

Was the Abrupt Dismissal of Petitioner's Sworn Complaint Without Remand for Further Proceedings Within the Province of the Court of Appeals for the Sixth Circuit?

This question is fairly comprised in "First Question," *supra.*

The injunction of the District Judge sitting in this diversity case conformed to the equity powers of a Kentucky court exercised to fit the circumstances of the specific situation and permitting the Union to exercise peacefully rights of assembly and singly or in groups to publicize its grievance or dispute whatever it may or might have been. The District Judge made no effort to determine the extent of the Petitioner's remedies under Kentucky law under Petitioner's prayer for general and special relief. After allowing time in which to produce further evidence, the Trial Court made the injunction permanent.

The State of Kentucky has elected to exercise its "historic powers" to restrain mass picketing, coercion, intimidation and violence or overt violence involved in public assembly and publicity to a grievance or dispute through the equity powers of its Courts. Cf. *Boyd* case, *supra; Blue Boar* case, *supra; National Electric Service Corporation* v. *District 50, United Mine Workers of America* (1955) ___ Ky. ___, 270 S. W. 2d 808; *Allen Bradley* case, *supra; Garner* case, *supra.* The thrust of Cimarron's case was for injunctive relief based upon irreparable injury to the date of the hearing. Cimarron claimed no damages but prayed for

general and special relief. At the hearing Cimarron introduced evidence of its loss of sales and actual monetary damages (Tr. 36, 37). Inasmuch as Cimarron's case was based upon the absence of a "labor dispute" and unlawful acts of the Union which prevent all persons, including, but not limited to, customers, railroad trains, and employees, from entering or leaving the mine premises, Cimarron's complaint was based upon grounds for which an injunction was sustainable under state law according to the Kentucky courts. Cf. *National Electric Service Corp.* v. *District 50, United Mine Workers of America, supra.* The product of the case at the trial was that the District Judge found no "labor dispute" to exist and confined its relief to the prevention of *unlawful picketing activities rather than the prevention of peaceful picketing with an unlawful purpose or peaceful picketing for whatever purpose. It was the character of the picketing and not the purpose of the picketing the District Judge dealt with in the Cimarron case.* However, there is no doubt that if the purpose of the picketing was to force the Cimarron men (who had voted twice to reject the Union as their bargaining representative) to join the Union against their votes and will, *a question not answered by either the Trial Court or the Court of Appeals for the Sixth Circuit,* then the purpose *was also unlawful under state and federal law.* Neither was the question of Cimarron's right to damages under Kentucky law decided by the Trial Court or the Appellate Court below. Cf. *Construction Workers* v. *New Burnside Veneer Co., Inc.* (1954) 274 S. W. 2d 787, —— Ky. ——.

In connection with diversity jurisdiction a federal court enforces state law and state policy. *Angel* v. *Bullington, N.C.* (1947) 330 US 183; *Clark* v. *Smith,* 38 US 195. In *United Mine Workers of America* v. *Gibbs* (1966) *supra,* this Honorable Court agreed with the Union that where the respondent's claim was based upon proofs of violence and intimidation and alleged violations of state common law as well as of federal law arising out of the same set of facts and presenting alternative remedies, the permissible scope of state remedies in this area is strictly confined to the direct consequences of such conduct and does not include consequences resulting from associated peaceful picketing or other proper union activity. Cf. *Youngdahl* v. *Rainfair, supra; Allen Bradley, supra; Garner, supra.*

Upon the transcript of this record, the Trial Court found no dispute over any legitimate objective of labor to exist between Cimarron, the Cimarron employees and the Union. Consequently, the jurisdiction of the District Court, sitting as a State Court, to enjoin mass picketing and conduct marked by violence and imminent threats to public order was not limited by any federal law or the decisions of This Honorable Court. The District Court had no greater power to do so and it had no lesser power to do so. *Garner, supra;* 28 USC 1332.

It is also apparent from the decisions of This Honorable Court that mass picketing, violence and imminent threats to public order are not immune from the injunctive powers of state courts in "industrial controversies," or "labor disputes" regardless of whether

the purpose served is "lawful," "unlawful,' or an "unfair labor practice." Again, the federal District Court, sitting as a state court, has no greater power to do so and no lesser power to do so. We urge that all roads lead to Rome and that the rationale of *Garner* has been exemplified in *United Automobile, Aircraft and Agricultural Implement Workers of America Affiliated with The Congress of Industrial Organizations, U.A.W.-CIO* v. *Wisconsin Employment Relations Board and Kohler Company* (1956), 351 U. S. 266, 76 S. Ct. 794, in which this Court said:

> "(7-9) There is no reason to re-examine the opinions in which this Court has dealt with problems involving federal-state jurisdiction over industrial controversies. They have been adequately summarized in Weber v. Anheuser-Busch, Inc., 348 U. S. 468, 474-477, 75 S. Ct. 480, 484-486, 99 L. Ed. 546. *As a general matter, we have held that a state may not, in the furtherance of its public policy, enjoin conduct 'which has been made an "unfair labor practice" under the federal statutes.'* Id., 348 U. S. at page 475 75 S. Ct. at page 485, and cases cited. *But our post-Taft-Hartley opinions have made it clear that this general rule does not take from the States power to prevent mass picketing, violence, and overt threats of violence. The dominant interest of the state in preventing violence and property damage cannot be questioned. It is a matter of genuine local concern. Nor should the fact that a Union commits a federal unfair labor practice while engaging in violent conduct prevents states from taking steps to stop*

the violence. This conclusion has been explicit in the opinions cited in note 12." (Emphasis supplied)

In *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Company* (March 25, 1969) 89 S. Ct. 1109, this Honorable Court stated:

"(11) *On the other hand, the Labor Management Relations Act gives no colorable protection to violent and coercive conduct incident to a labor dispute.* Allen-Bradley Local No. 1111, United Electrical, Radio and Machine Workers of America v. Wisconsin Employment Relations Board, 315 U. S. 740, 62 S. Ct. 820, 826, 86 L. Ed. 1154 (1942). *The state interest in preventing 'conduct marked by violence and imminent threats to public order' is compelling,* San Diego Building Trades Council Milmen's Union Local 2020 v. Garmon, 359 U. S. 236, 247, 79 S. Ct. 773, 781, 3 L. Ed. (2d) 775 (1959), *and such conduct may be enjoined by state courts.* Youngdahl v. Rainfair, 355 U. S. 131, 78 S. Ct. 206, 2 L. Ed. (2d) 151 (1957); United Automobile, Aircraft and Agricultural Implement Workers of America v. Wisconsin Employment Relations Board, 351 U. S. 266, 76 S. Ct. 794, 100 L. Ed. 1162 (1956). Cf. International Union of United Automobile, Aircraft and Agricultural Implement Workers v. Russell, 356 U. S. 634, 78 S. Ct. 932, 2 L. Ed. (2d) 1030 (1958); United Construction Workers of America (U.A.W.-C.I.O.) Affiliated with United Mine Workers of America v. Laburnum Construction Co., 347 U. S. 656, 74 S. Ct. 833, 98 L. Ed. 1025 (1954). The federal concern for protecting such conduct when engaged in

by railway employees is no less tenuous. The states' interest in preventing it is no less compelling" (Emphasis supplied).

Upon the authority of *Garner* and the above cases, mass picketing of coercive, intimidating and unlawful character has not been immunized from the historic powers of the state regardless of its lawful or unlawful purpose. Cf. *Lauf* v. *Shinner, supra,* relied upon by the Trial Court below (Transcript 156); *Ford* v. *Boeger* (CA 8-1966) 362 F. (2d) 999, cert. den. 386 U. S. 914; Rehearing den. 387 U. S. 947. The District Court below did not exceed its jurisdiction as a state Court when it enjoined mass picketing and coercive conduct and permitted the peaceful implementation of the Union's rights of free speech and public assembly to advance its purpose regardless of whether that purpose was lawful, unlawful or an unfair labor practice under state and federal law. We urge that it did not exceed its jurisdiction as a United States District Court under Title 28 U.S.C. 1332 and that its jurisdiction as a state Court is not diminished by the Norris-LaGuardia Act. *Ford* v. *Boeger, supra.* Cf. *Local 332, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, et al* v. *Grand Trunk Western Railroad Company,* (CA 6-1956) 239 F. (2d) 851. *The Appellate Court below has thus decided the issue contrary to the prior decisions of its own Circuit in Local 332, et al* v. *Grand Trunk Western Railroad Company, supra.*

This Honorable Court has limited the power of state courts to prohibit peaceful picketing and has recog-

nized their right in some instances to enjoin all picketing. However, this Honorable Court has never held that the Federal District Courts sitting as state courts in diversity cases have no jurisdiction to entertain the same remedies and injunctive relief as state courts may provide.

The Appellate Court below overlooked or misapprehended the facts and the law of this case and dismissed Cimarron's complaint without further proceedings in conformity with its rights under Kentucky law. In doing so, it decided this case contrary to the prior decision of the Sixth Circuit in *Local 332 et al* v. *Grand Trunk Western Railroad Company, supra, and the decisions of This Honorable Court.* Such action is error and denies Cimarron due process. In doing so, the Appellate Court below has decided the Cimarron case contrary to decisions of this Honorable Court.

FOURTH QUESTION.

Was It Accepted and Usual Course of Judicial Proceedings By the Court of Appeals Below to Disregard: the Character of Injunctive Relief Granted, the Character of Conduct Enjoined; the State and Federal Questions Involved in the Diversity Proceedings Under Applicable Decisions of This Honorable Court, the Sixth Circuit and the Eighth Circuit; and, Enter Its Decision Vacating the Injunction and Remanding for Dismissal of the Complaint *Upon an Erroneous Statement of the Evidence Contained in the Transcript of the Record.*

This question and its subparts are fairly comprised within the above and foregoing arguments. However, because an erroneous appendix was prepared by counsel and filed after the briefs were printed under Rule 30 of the Court of Appeals for the Sixth Circuit and errors of fact and law were apparent in the Court's opinion and were not corrected in its order denying petition for rehearing, Cimarron filed motion for supplemental petition for rehearing suggesting a rehearing *in banc*. The learned Court had referred to nonexistent "picket signs," to "pro-forma" requests for protection; had refused to consider the applicability of state law in diversity cases; had ignored the character of the injunction granted; had completely passed over the Trial Court's finding that *no dispute* existed which presented the issue of whether a labor dispute existed between the parties so as to invoke the limitations of the Norris-LaGuardia Act. Nevertheless, in its order denying rehearing, the learned Court observed (page 7):

> "But it should be noted that the Court was made fully aware of the error in the appendix concerning the terms of the injunction as finally entered by the District Judge and read and considered the entire transcript *before him* (sic) before deciding this case" (Emphasis Supplied).

The appendix had many errors in 24 pages out of its total of 55 pages which counsel for the Union agreed to correct in the presence of the Appellate Court. Apparently, the Appellate Court below approached the case "de novo," but in doing so it should have observed the applicable state and federal authorities and statutes herein above cited. Had it done so, it would not have disregarded the rules of evidence underlying a justifiable conclusion of a Trial Court under Section 7(e) of the Norris-LaGuardia Act where three rules are available. Neither would it have passed over the rights of parties under state law in diversity cases or overlooked the importance of determining the nature of the injunctive relief granted and whether a "labor dispute" existed.

This was not the accepted and usual course of judicial proceedings and unless the supervision of this Honorable Court is invoked, Petitioner, whose complaint has been dismissed without further proceedings or hearing, has not had its rights adjudicated and has been denied due process of law under the Fifth Amendment to the Constitution of the United States.

CONCLUSION.

WHEREFORE, PETITIONER PRAYS THAT THIS HONORABLE COURT WILL GRANT THIS PETITION.

Respectfully submitted,

W. STUART MCCLOY,
JAMES G. WHEELER,
Counsel for Petitioner.